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No. 98-627

In the Supreme Court of the United States

OCTOBER TERM, 1998

UNITED TRANSPORTATION UNION, PETITIONER

v.

RODNEY SLATER, SECRETARY OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Railroad Administration's regulatory definition of the term "reconstruction" in 49 U.S.C. 21106(2) reflects a permissible exercise of rulemaking authority conferred by statute.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Atchison, Topeka & Santa Fe Ry. v. *Peña*, 44 F.3d 437 (7th Cir. 1994), aff'd 516 U.S. 152 (1996)	8
Chemical Mfrs. Ass'n v. *EPA*, 919 F.2d 158 (D.C. Cir. 1990)	8
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)	6
Commodity Futures Trading Comm'n v. *Schor*, 478 U.S. 833 (1986)	8
Mandina v. *United States*, 472 F.2d 1110 (8th Cir.), cert. denied, 412 U.S. 907 (1973)	9
Mississippi Power & Light Co. v. *Mississippi ex rel. Moore*, 487 U.S. 354 (1988)	8
United Transportation Union v. *Dole*, 797 F.2d 823 (10th Cir. 1986)	7

Statutes and regulations:

Act of July 5, 1994, Pub. L. No. 103-272, 108 Stat. 745:	
§ 1, 108 Stat. 745	2
§ 6(a), 108 Stat. 1378	2
Federal Railroad Safety Authorization Act of 1976, Pub. L. No. 94-348, § 4(a), 90 Stat. 818	2
Hobbs Administrative Orders Review Act, 28 U.S.C. 2342(7)	6

Statutes and regulations—Continued: Page

Hours of Service Act, 45 U.S.C. 61-64b (1988 & Supp. V 1993) 2
49 U.S.C. 103(a) 2
49 U.S.C. 103(c) 2
49 U.S.C. 20102 ..... 2, 9
49 U.S.C. 20114(c) 6
49 U.S.C. 21101-21108 2
49 U.S.C. 21106 ..... 3, 5
49 U.S.C. 21106(1) 3, 4, 5, 6, 10
49 U.S.C. 21106(2) 3, 5, 6, 7, 9, 10
49 U.S.C. 21303-21304 2
49 C.F.R.:
Section 1.49(d) 2
Pt. 228, Subpt. C 3
Section 228.101(c)(2) 4
Section 228.101(c)(2)(ii) 10

Miscellaneous:

43 Fed. Reg. (1978):
p. 31,006 3
pp. 31,006-31,014 3
p. 31,009 4
H.R. Rep. No. 1166, 94th Cong., 2d Sess. (1976) 9
H.R. Rep. No. 180, 103d Cong., 1st Sess. (1993) 2
2A Norman J. Singer, *Sutherland Statutory Construction* (5th ed. 1992) 9

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 149 F.3d 851. The decision of the Federal Railroad Administration (Pet. App. 12a-15a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 9a) was entered on July 16, 1998. The petition for a writ of certiorari was filed on October 14, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The federal hours of service laws, known collectively prior to 1994 as the Hours of Service Act (HSA), are intended to promote railroad safety by ensuring that fatigue does not prevent railroad employees from properly performing their duties.[1] The Secretary of Transportation is charged with the administration of those laws. 49 U.S.C. 103(a). The Secretary has delegated those functions to the Administrator of the Federal Railroad Administration (FRA), a modal administration of the Department of Transportation (DOT). 49 U.S.C. 103(c); 49 C.F.R. 1.49(d).

In the Federal Railroad Safety Authorization Act of 1976, Congress amended the HSA to include two provisions relating to railroad employee sleeping quarters. Pub. L. No. 94-348, § 4(a), 90 Stat. 818. Those sleeping quarters serve as lodging at away-from-home terminals for train crews, providing them food and lodging during short-term layovers between tours of duty. The first of those provisions requires that all sleeping quarters must be "clean, safe, and sanitary" and must give residents "an opportunity for rest free from the interruptions caused by noise under the control of the carrier."

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[1] In 1994, Congress repealed the Hours of Service Act (then codified at 45 U.S.C. 61-64b) and the other federal railroad safety statutes and reenacted them as part of a broad recodification of the federal transportation laws. See Act of July 5, 1994, Pub. L. No. 103-272, § 1, 108 Stat. 745. They are now codified at 49 U.S.C. 20102, 21101-21108, and 21303-21304. The recodification made no substantive changes to those statutes, although it altered their arrangement and made editorial changes to many provisions, including those at issue in this case. See Pub. L. No. 103-272, § 6(a), 108 Stat. 1378; H.R. Rep. No. 180, 103d Cong., 1st Sess. 1-5 (1993). All references to the hours of service laws are to the recodified version.

49 U.S.C. 21106(1). The second sleeping quarter provision states:

> A railroad carrier and its officers and agents—
>
> * * * * *
>
> (2) may not begin, after July 7, 1976, construction or reconstruction of sleeping quarters referred to in clause (1) of this section in an area or in the immediate vicinity of an area, as determined under regulations prescribed by the Secretary of Transportation, in which railroad switching or humping operations are performed.

49 U.S.C. 21106(2).

While Section 21106(2) prohibits the "construction or reconstruction" of sleeping quarters in yards where potentially hazardous railroad switching and humping operations take place, it does not restrict the continued use of sleeping quarters that existed as of July 7, 1976. The hours of service laws do not define the term "reconstruction" or identify the point at which repair or renovation of an existing facility comes within the restrictions of Section 21106(2). In July 1978, after notice-and-comment rulemaking, the FRA promulgated a final rule implementing Section 21106(2). 43 Fed. Reg. 31,006. The regulations identify the prospective sleeping quarter locations that are subject to approval by the FRA, indicate the information that must be submitted with requests for location approvals, and discuss the general policy considerations that the FRA employs in ruling on requests for such approvals. *Id.* at 31,006-31,014; 49 C.F.R. Pt. 228, Subpt. C. In addition, the

regulations define the statutory term "reconstruction" as follows:

> *Reconstruction* shall refer to the—(i) Replacement of an existing facility with a new facility on the same site; or (ii) Rehabilitation or improvement of an existing facility (normal periodic maintenance excepted) involving the expenditure of an amount representing more than 50 percent of the cost of replacing such facility on the same site at the time the work of rehabilitation or improvement began, the replacement cost to be estimated on the basis of contemporary construction methods and materials.

43 Fed. Reg. at 31,009; 49 C.F.R. 228.101(c)(2).

2. Petitioner is a labor union that represents railroad employees, including employees of the Norfolk and Western Railway Company (N&W) who used sleeping quarters located in the railroad's yard in Moberly, Missouri.[2] The Moberly facility had been the subject of numerous complaints by N&W employees and petitioner. Petitioner asserted that the facility violated Section 21106(1) because it was not "clean, safe, and sanitary" and did not provide railroad employees with an adequate opportunity for undisturbed rest. C.A. App. 6-18. In addition, county health authorities inspected the facility and found several health and safety violations. *Id.* at 21-29.

In the spring of 1996, N&W decided to renovate the Moberly facility. C.A. App. 20. Because the Moberly facility is located "in an area or in the immediate vicinity of an area * * * in which railroad switching or

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[2] On September 1, 1998, the Norfolk and Western Railway Company ceased to exist upon its merger with the Norfolk Southern Railway Company. N & W Br. in Opp. 1 n.1.

humping operations are performed," 49 U.S.C. 21106(2), petitioner informed N&W that it opposed renovation, insisting instead on the construction of a new facility away from the railroad yard. C.A. App. 45-46. N&W responded that the planned renovation would take place and that the railroad had prepared renovation plans addressing the poor conditions that the employees and the county had cited. *Id.* at 51-55.

In September 1996, petitioner raised its objections to N&W's renovation plans with the FRA, prompting the FRA to conduct its own inspection of the Moberly facility to determine whether it was operating in violation of Section 21106. C.A. App. 58-59. The FRA's inspector found that the facility was not "clean, safe, and sanitary" as required by Section 21106(1) and that noise levels from the train yard prevented proper, undisturbed sleep, but he did not recommend that N&W be held in violation of that Section. *Id.* at 64-65. Instead, he chose to give the railroad an opportunity to cure the facility's deficiencies. *Id.* at 66. The FRA also determined, based on information provided by N&W, that the cost of N&W's planned renovations would be approximately 25 percent of the cost of replacing the facility at a different location. *Id.* at 48-50, 84-87.

In a February 1997 letter to petitioner's General Chairman, the FRA Administrator responded to petitioner's objections regarding the condition of the Moberly facility and the propriety of N&W's planned renovations. The Administrator stated that the FRA would give N&W a reasonable amount of time to correct sanitary problems found in FRA's inspection of the facility, that additional testing by FRA indicated that the facility met the noise standard of Section 21106(1), and that the cost of N&W's planned renovations would be approximately 25 percent of the cost of a new facility

and therefore did not qualify as "reconstruction" within the meaning of Section 21106(2).[3] Pet. App. 12a-15a. The Administrator therefore denied petitioner's request that the FRA prevent N&W from renovating the Moberly facility.

3. The court of appeals affirmed the FRA's decision. Pet. App. 1a-8a.[4] The court held that "[t]he term 'reconstruction,' as used in § 21106(2), is imprecise and unclear." *Id.* at 7a. The court therefore held that, under this Court's decision in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), "the question of [that term's] precise meaning is just the kind of question for which we should defer to the administering agency for a regulatory answer." Pet. App. 7a. The court of appeals rejected petitioner's contention that the FRA's rulemaking authority under Section 21106(2) is limited to defining the term "immediate vicinity." See *id.* at 5a, 7a. Finally, the court held that the FRA's definition of "reconstruction" is not arbitrary, capricious, or contrary to law because Section 21106(2) "contemplates some degree of renovation or improvement" of facilities constructed before July 7, 1976. *Ibid.*[5]

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[3] Petitioner's contention (Pet. 5) that "[i]t is undisputed that the railroad intends to begin a major reconstruction of its sleeping quarters" is obviously incorrect.

[4] Any "final action of the Secretary of Transportation" under the hours of service laws is reviewable in the court of appeals pursuant to the Hobbs Administrative Orders Review Act, 28 U.S.C. 2341 *et seq.* See 28 U.S.C. 2342(7); 49 U.S.C. 20114(c).

[5] Petitioner also contended that the FRA had arbitrarily failed to find the Moberly facility in violation of Section 21106(1). The court of appeals held that that claim was moot in light of the planned renovation of the building. Pet. App. 8a. Petitioner does not seek review of that holding.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of another court of appeals. Further review is therefore not warranted.

1. Petitioner contends that "[t]he Seventh, Eighth and Tenth Circuits have reached differing conclusions regarding the powers of the FRA to promulgate regulations under the" hours of service laws. Pet. 9. That contention is incorrect.

Petitioner's reliance on *United Transportation Union* v. *Dole*, 797 F.2d 823 (10th Cir. 1986), is particularly misplaced. That case addressed the question whether a railroad's proposed reopening of pre-1976 rail yard sleeping quarters that it had purchased from another railroad after 1976 fell under the FRA's regulatory definition of the term "construction" as used in Section 21106(2). See 797 F.2d at 829-830. The FRA's statutory authority to issue that or any other regulation implementing Section 21106(2) was not at issue in the case. Petitioner's sole basis for suggesting the existence of a circuit conflict is the statement in a *concurring* opinion that Congress, in enacting Section 21106(2), intended "that a railroad should make no significant additional investment in sleeping quarters near hazardous switching or humping operations after July 1976." 797 F.2d at 832 (Logan, J., concurring). That statement was not part of the opinion for the Tenth Circuit panel. In any event, the concurring judge did not attempt to define the point at which "additional investment in sleeping quarters" becomes so "significant" as to constitute "construction" or "reconstruction" within the meaning of Section 21106(2).

Petitioner's reliance (Pet. 10-11) on *Atchison, Topeka and Santa Fe Railway* v. *Peña*, 44 F.3d 437 (7th Cir. 1994) (en banc), aff'd, 516 U.S. 152 (1996) (*ATSF*), is also misplaced. In *ATSF*, the Seventh Circuit held that an interpretive rule issued by the FRA concerning certain duty time provisions of the hours of service laws was not entitled to deference. 44 F.3d at 441-444. The statutory provisions at issue in *ATSF*, however, did not grant the agency any general rulemaking authority. Moreover, the interpretive rule under review in that case did not reflect the agency's independent exercise of expert judgment. Rather, the FRA had simply chosen to acquiesce, on a nationwide basis, in the decision of a single court of appeals, thereby reversing a 23-year-old agency interpretation of the pertinent statutory provision. *Id.* at 441-444.

The instant case is distinguishable from *ATSF* in several important respects. The statutory provision at issue here includes an express grant of rulemaking authority that exists nowhere else in the hours of service laws.[6] Moreover, the FRA's definition of "reconstruction" has been unchanged for 20 years, was adopted through notice-and-comment rulemaking, and represents the agency's independent judgment regard-

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[6] As petitioner conceded in the court of appeals (Pet. C.A. Rep. Br. 5 n.2), an agency's interpretation of a statutory provision that defines the scope of its jurisdiction or authority is entitled to deference. See, *e.g.*, *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 844-845 (1986); see also *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354, 380-382 (1988) (Scalia, J., concurring). Such deference to an agency's interpretation of its statutory authority includes deference to interpretations of provisions defining the scope of agency rulemaking authority. See *Chemical Mfrs. Assoc.* v. *EPA*, 919 F.2d 158, 162-163 (D.C. Cir. 1990).

ing the proper construction of the statutory term. Petitioner's claim of a circuit conflict is therefore unfounded.[7]

2. Petitioner contends (Pet. 12-14) that the FRA's rulemaking authority under Section 21106(2) is limited to defining the term "immediate vicinity." That claim is incorrect. The text of the statute imposes no such limitation.[8] The legislative history on which petitioner relies (Pet. 7-8) also does not support its position. The House Report notes that under the Hours of Service Act, "[t]he Secretary, after appropriate rulemaking, may determine that sleeping quarters shall be a specific distance away from the area of switching." H.R. Rep. No. 1166, 94th Cong., 2d Sess. 11 (1976). The House Report does not address the question whether the Secretary may promulgate regulations concerning other

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[7] Similarly wide of the mark is petitioner's implication (see Pet. 11-12) that the FRA's requests to Congress to expand its regulatory authority under the hours of service laws show that the agency does not currently have the authority to define "reconstruction." The FRA congressional testimony cited in support of that proposition addresses portions of the hours of service laws unrelated to the sleeping quarters provisions. The FRA has never specifically requested a statutory expansion of its rulemaking authority under Section 21106(2).

[8] Petitioner relies (Pet. 14) on the principle that "[r]eferential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent." 2A Norman J. Singer, *Sutherland Statutory Construction* § 47.33 (5th ed. 1992). Courts have refrained from applying that guideline, however, "when evident sense and meaning require a different construction." *Mandina* v. *United States*, 472 F.2d 1110, 1112 (8th Cir.), cert. denied, 412 U.S. 907 (1973). As we explain below, the FRA's decision to promulgate a regulatory definition of the term "reconstruction" serves the purposes of Section 21106(2) by providing clear guidance as to the line between lawful and unlawful conduct.

aspects of Section 21106(2). Contrary to petitioner's suggestion (Pet. 7-8), that Report neither explicitly nor implicitly suggests that the Secretary's rulemaking authority under Section 21106(2) is limited to defining the term "immediate vicinity." To the contrary, as the court of appeals recognized, "[t]he term 'reconstruction,' as used in § 21106(2), is imprecise and unclear. Therefore, under *Chevron*, the question of its precise meaning is just the kind of question for which we should defer to the administering agency for a regulatory answer." Pet. App. 7a.

Section 21106(2) clearly allows pre-existing sleeping quarters to remain in operation, even where a facility is located "in an area or in the immediate vicinity of an area * * * in which railroad switching or humping operations are performed." Congress thus declined to subject railroads to the expense that would have resulted from an abandonment of existing facilities. The statute presumably contemplates that some degree of repair or renovation will be permitted on those facilities; a contrary reading would prohibit even work done to ensure that the facilities are "clean, safe, and sanitary" as required by Section 21106(1). The FRA's definition of "reconstruction" permits "[r]ehabilitation or improvement of an existing facility" if, but only if, that approach costs no more than 50% of the cost of replacing the facility. 49 C.F.R. 228.101(c)(2)(ii). The FRA's regulatory definition reasonably balances Section 21106's competing objectives, and the court of appeals correctly sustained it.[9]

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[9] Petitioner also cites several authorities relating to the impact of railroad employee fatigue on safety (Pet. 14-17) and then concludes (Pet. 17) that the decision below will have "serious consequences to safe railroad operations." There is no dispute that

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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providing railroad employees with adequate opportunities for rest is an integral component of safe railroad operations. Nothing in the hours of service laws suggests, however, that Congress regards the FRA's definition of "reconstruction" as inconsistent with railroad safety.